

No. 3699

In the United States
Circuit Court of Appeals
For the Ninth Circuit

E. L. COBB as Trustee for the Craig Lumber Co.,
a corporation, Bankrupt, Appellant,

vs.

McDONALD-WEIST LOGGING CO., a corporation
Appellee.

No. 3704

McDONALD-WEIST LOGGING CO., a corporation
Appellant,

vs.

E. L. COBB as Trustee for the Craig Lumber Co.,
a corporation, Bankrupt, Appellee.

UPON APPEALS FROM THE DISTRICT COURT
FOR ALASKA, DIVISION NUMBER ONE.

BRIEF FOR E. L. COBB AS TRUSTEE, Etc.,
Appellant in No. 3699 and Appellee in No. 3704

J. H. COBB,
Solicitor for E. L. Cobb,
as Trustee, etc.

STATEMENT OF THE CASE

The appellee and the Craig Lumber Company, are both corporations of the State of Washington. In January 1918, the two corporations made and entered into a contract in the Territory of Alaska, whereby the appellee was to cut and deliver logs in Alaska to the Lumber Company, and the Lumber Company was to pay therefor \$10.00 per thousand feet board measure. Under this contract the appellee cut and delivered 3,779,426 feet of logs. In March 1919, the Craig Lumber Company was adjudged a bankrupt. On May 22nd, 1919 the appellee presented a claim for \$27,871.50 with interest, for an alleged balance due on the contract, and also claimed a loggers' lien on certain logs and lumber in the hands of the Trustee.

Both the claim and the lien were contested by the Trustee, the former on the ground that the contract was void because of the failure of the McDonald-Weist Logging Company to comply with the laws of Alaska authorizing it to do business or make contracts in the Territory: and the latter upon the ground (even if the contract were binding and the claim good) that the Loggers' Lien Statute, (Compiled Laws of Alaska, section 709), did not give Liens to contractors, but only to laborers. The Referee sustained the Trustee's objection to the claim, not passing upon the objection to the lien as such, as

it became immaterial. From this decision the appellee appealed to the District Judge, who reversed the ruling of the Referee and remanded the case for further proceedings before the Referee. The Trustee thereupon petitioned this Court for a review of the ruling of the District Judge. The petition for review was dismissed for want of jurisdiction.

Cobb vs. McDonald-Weist Company, 269 Fed. 755.

Upon the coming down of the mandate, the Referee in deference to the decision of the District Judge, allowed the claim, but denied the lien. From this ruling both parties appealed. The decision of the Referee was affirmed by the Judge, and both parties have appealed to this court.

The McDonald-Weist Company complains of the decision of the Court in so far as it disallowed their claim of a loggers lien.

The Trustee complains of the decision in allowing the claim at all in the following:

ASSIGNMENT OF ERRORS

1.

The Court erred in ruling and holding that the McDonald-Weist Logging Company, a foreign corporation could prosecute its claim in the bankruptcy court notwithstanding its failure to comply with the laws of Alaska authorizing foreign corporations to do business in the territory.

II.

The Court erred in ruling and holding that the defense of the failure to comply with the laws of Alaska governing foreign corporations doing business

in the territory could be interposed in this case by the bankrupt, the other party to the contract, but could not be interposed by the Trustee.

III.

The Court erred in sustaining the claim of the McDonald-Weist Logging Company, as a valid claim against the bankrupt and in refusing to expunge said claim from the list of claims against said bankrupt.

These assignments raise the single question: Can a foreign corporation doing business and contracting in Alaska without having first complied with the local law authorizing it to do business, enforce a claim in bankruptcy growing out of such business?

A stipulation as to the facts, which was made the basis of the Court's findings on that issue (Rec. 8-10) was filed, and shows the following facts:

I.

The McDonald-Weist Company is a corporation of the State of Washington.

II.

The contract upon which the claim in controversy is based, and out of which it grows, was made in the Territory of Alaska on the 2nd day of January, 1918, and was to be performed entirely within the Territory of Alaska.

III.

On December 12th, 1917, the McDonald-Weist Company filed in the office of the clerk of the District Court for the First Division, the following

papers, and no others to-wit:

(a) A certified copy of its Charter or Articles of Incorporation.

(b) Its written consent to be sued, and the appointment of L. J. MacDonald as its agent.

(c) A document attached to document (b) filled out in the handwriting of L. J. MacDonald which was, in form, an acceptance of the appointment, but the same was never subscribed by the said L. J. MacDonald.

IV.

The MacDonald Weist Company filed in the office of the Secretary of the Territory of Alaska the following documents and no others, at the dates mentioned, to wit: (18)

(a) Charter filed January 28th, 1918.

(b) Appointment of agent and acceptance of appointment filed January 28th, 1918.

(c) Annual statement filed February 16th, 1918.

(d) Annual statement filed February 27th, 1919.

V.

The Annual Statement filed February 16th, 1918, was not verified by the President and Secretary of the MacDonald-Weist Company, nor attested by the directors, and the Annual Statement filed February 27th, 1919, was not attested by a majority of the directors.

The statutes of Alaska bearing upon the subject are Compiled Laws of Alaska, Section 654, 655, 657, 658, (as amended by Chapter 20, Session Laws of Alaska 1917) and 660, which read as follows:

“Section 654. All corporations or joint stock com-

panies organized under the laws of the United States, or the laws of any state or territory of the United States shall, before doing business within the District, file in the office of the Secretary of the District and in the office of the Clerk of the District for the division wherein they intend to carry on business, a duly authenticated copy of their charter or articles of incorporation, and also a statement verified by the oath of the president and secretary of such corporation, and attested by a majority of its board of directors, showing—

“(1) The name of such corporation and the location of its principal office or place of business without the district: and, if it is to have any place of business or principal office within the district, the location thereof;

“(2) The amount of capital stock;

“(3) The amount of its capital stock actually paid in money;

“(4) The amount of its capital stock paid in any other way, and in what;

“(5) The amount of the assets of the corporation and of what the assets consist, with the actual cash value thereof;

“(6) The liabilities of such corporation, and if any of its indebtedness is secured, how secured, and upon what property.

“Such corporation or joint company shall also file at the same time, and in the same office, a certificate, under seal of the corporation and the signature of its president, vice-president, or other acting head, and its secretary, if there be one, certifying that the corporation has consented to be sued in the courts of the district upon all causes of actions

arising against it in the district, and that the service of process may be made upon some person, a resident of the district, whose name and place of residence shall be designated in such certificate, and such service, when so made upon such agent, shall be valid service on the corporation or company, and such agent shall reside at the place of business of such corporation or company in the district."

"Sec. 655. The written consent of the person so designated to act as such agent shall be filed in like manner, and such designation shall remain in force until the filing in the same office of a written revocation thereof, or of the consent, executed in like manner. A certified copy of the designation so filed accompanied with a certificate that it has not been revoked, is presumptive evidence of the execution thereof, and conclusive evidence of the authority of the officer executing it."

"Sec. 657. If any such corporation or company shall attempt or commence to do business in the district without having first filed said statements, certificates, and consents required by this chapter, it shall forfeit the sum of twenty-five dollars for every day it shall so neglect to file the same; and every contract made by such corporation, or any agent or agents thereof, during the time it shall so neglect to file such statements, certificates, or consents, shall be voidable at the election of the other party thereto. It shall be the duty of the United States attorney for the district to sue for and recover, in the manner of the United States, the penalty above provided, and the same, when so recovered shall be paid into the Treasury of the United States."

"Sec. 658. Every foreign corporation or company

shall annually and within sixty days (60) from the first day of January each year make a report, which shall be in the same form and contain the same information as required in the statement mentioned in Section Six Hundred and fifty-four, Chapter twenty-three of the Compiled Laws of the Territory of Alaska, which report shall be filed in the office of the Secretary of the Territory of Alaska, and a duplicate thereof in the office of the clerk of the District Court for the division of the Territory wherein the business of the corporation is carried on."

"Sec. 660. If any such corporation or company shall fail to comply with any of the provisions of this chapter, all its contracts with citizens of the district shall be void as to the corporation or company, and no court of the district or of the United States, shall enforce the same in favor of the corporation or company so failing."

It will thus be seen that while the McDonald-Weist Company had apparently intended to comply with the law, and taken some steps in that direction, it had wholly failed to do so, in this:

1st In the Secretary's office,

- (a) It failed to file articles of incorporation before making the contract.
- (b) It failed to file its appointment of agent and his acceptance before the contract was made.
- (c) The annual statements filed were not in compliance with the law and were in effect no statements.

2nd. In the Clerks office the company failed to

comply with the law in the following:

- (a) It filed no acceptance of agency.
- (b) It filed no annual statement at all at the time, and during the period the contract was entered into, and was being performed.

A claim against a bankrupt estate, in favor of a foreign corporation, growing out of business done by it, without having first complied with the laws is void and not a provable claim in Bankruptcy.

1. Loveland on Bankruptcy 636.

Brandenburg on Bankruptcy Sec. 522.

In re Montello Brick Works, 163 Fed. 621, Affirmed 172 Fed. 311. S. C. 174 Fed. 498.

Buffalo Ref. Mchn. Co., vs. Penn. H. & P. Co. 178 Fed. 696.

La Moine L. & T. Co., vs. Kesterson, 171 Fed. 980.

Pittsburg Con. Co., vs. W. S. B. Ry. Co. 154 Fed. 929, 11 L. R. A. (N. S.) 1145.

Tri-State Am. Co., vs. Forest Park, Etc. Co. 90, S. W. Rep. 1020."

These authorities, it seems to us, settle the question in favor of the appellant.

The learned trial Judge, however, while admitting in his opinion (Rec. 28) that the appellee had only "made an abortive effort to comply with the laws of the Territory," held in effect that the Section of the statute quoted above did not affect the matter in controversy "for the reason that the Craig Lumber Company was not a citizen of the Territory." This we think, is entirely a too narrow and technical view of the sense in which the term "citizen" is used in the statutes. It is said in the 11th Corpus Juris, page 774, "While the word citizen is capable of more

meanings than one, it is not a convertible term with 'inhabitant' or 'resident,' although it is often used synonymously with such terms without any implication of political or civil privileges. It may indicate a permanent resident, or one who remains for a time, or from time to time. The word must always be taken in the sense which best harmonizes with the subject matter in which it is used." Of course, there is in the United States, a dual citizenship in that there are citizens of the States and citizens of the United States, and one may be a citizen of the United States without being a citizen of any state, or he may be a citizen of a state without being a citizen of the United States. In that sense, there are no citizens of a Territory, and in the statute in question, the narrow meaning indicated in the opinion of the trial Judge, would render the Section quoted, meaningless and void. To use the word in the sense which best harmonizes with the subject matter, it is clear what Congress had in mind, where those individuals, corporations or associations legally domiciled in the territory, and legally doing business and making contracts therein. It was these that Congress was protecting against suits by outlaw corporations, and the word citizen as used in the statute, was used in this sense, and not in the sense of an individual having political rights. Any other construction would place all corporations, although organized in the territory and all the stockholders of which were citizens of the United States and residents of the territory under a different law than the same citizens would be, doing business as individuals. This surely was not the intent of Congress.

We think therefore, that the construction given of Section 660, by the learned trial Judge, was entirely too narrow and technical, and ignored the whole subject matter and purpose of the statute.

The learned trial Judge further held, that the Trustee could not raise the question at all, because the statutes provided that all such contracts are to be voidable at the election of the other party. That is, the Court held in effect, that the Craig Lumber Company could have invalidated the contract, but the Trustee could not, and further held, that the Craig Lumber Company had elected to abide by it.

Both these contentions are erroneous. If one is precluded by election from objecting to a suit by an outlaw corporation, the whole purpose of the statute is avoided, for any person entering into such a contract makes his election then, and if the Court's reasoning is correct, he could never thereafter object to it.

The holding of the Court that the Trustee could not interpose an objection to the claim because the claimant had not complied with the law, overlooks the powers and duties of a Trustee in Bankruptcy. He may make any objections to claims that the Bankrupt can make

Brandenburg on Bankruptcy Sec. 653,
Atkins vs. Wilcox 105 Fed. 595.

He takes all the rights and titles of the Bankrupt, as well as any rights of the creditors against adverse claimants to the estate.

Brandenburg on Bankruptcy Sec. 724.

Besides, under the plain provision of Section 660,

Comp. Laws of Alaska, it was the plain duty of the Court, to expunge the claim of the McDonald-Weist Logging Company, upon its own motion upon the facts being made known.

Upon the second point raised in the appeal of the McDonald-Weist Logging Company, by their contention that they had a loggers lien to secure their claim, we content ourselves with citing the opinion of the trial Court, Page 34 and 35, in the record, and the authorities there cited.

We respectfully ask that the order of the District Court be reversed and the cause be remanded with instructions to the Court below, to expunge the claim of the appellee.

J. H. COBB,
Attorney for E. L. Cobb as Trustee, etc.

